

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

8 DARLENE KROLL,)
9 Plaintiff,) No. CV-09-0077-CI
10 v.) ORDER DENYING PLAINTIFF'S
11 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
12 of Social Security,) AND GRANTING DEFENDANT'S
13 Defendant.) MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 10, 12.) Attorney Clifford King B'Hymer represents Darlene Kay Kroll (Plaintiff); Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 5.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

Plaintiff filed for disability insurance benefits (DIB) and supplemental security income (SSI) on June 5, 2006. (Tr. 14, 65-67, 307-309.) She alleged disability due to agoraphobia, depression, panic disorder, and anxiety with an alleged onset date of December 20, 2005. (Tr. 158.) Her claim was denied initially and on

1 reconsideration. (Tr. 14, 33-34, 39-42.) Plaintiff requested a
2 hearing before an administrative law judge (ALJ), which was held on
3 September 23, 2008, before ALJ Richard Paul Gaughen. (Tr. 314-340.)
4 Plaintiff, who was represented by counsel, and vocational expert
5 Daniel McKinney (VE) testified. (Tr. 315.) The ALJ denied benefits
6 on October 27, 2008. (Tr. 11-25.) The Appeals Council denied
7 review. (Tr. 4-7.) The instant matter is before this court
8 pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings and are briefly summarized here. At the time of the
12 hearing, Plaintiff was 48 years old. (Tr. 65, 336.) She attended
13 school until eleventh grade and did not obtain a high school
14 equivalency degree. (Tr. 162, 336.) She was married and living
15 with her spouse, and had one adult son and a daughter who lived with
16 a grandparent. (Tr. 275.) Plaintiff had a work history as a home
17 attendant, and at the time of the hearing was working sixteen hours
18 a week caring for an elderly person. (Tr. 319, 324.) She stated
19 she did not work more because she was more comfortable at home, and
20 it was difficult for her to be around crowds of people. (Tr. 321-
21 23.)

22 **ADMINISTRATIVE DECISION**

23 At step one, ALJ Gaughen found although Plaintiff was working,
24 her employment had not met the level of substantial gainful activity
25 since the alleged onset date. (Tr. 16.) At step two, he found
26 Plaintiff had severe impairments of "a major depressive disorder and
27 panic disorder with agoraphobia." (Tr. 17.) At step three, he
28

1 determined the impairments, alone and in combination, did not meet
 2 or medically equal one of the listed impairments in 20 C.F.R., Pt.
 3 404, Subpt. P, Appendix 1 (Listings). (*Id.*) At step four, he
 4 determined Plaintiff had the residual functional capacity (RFC) to
 5 perform work at all exertional levels with the following non-
 6 exertional limitations:

7 [C]laimant has deficits in arithmetic and written language
 8 skills. She would not be able to engage in higher level
 9 social interaction, but she would be able to engage in
 10 perfunctory social interaction. She would likely present
 11 as slow in adapting to changes to significant work changes
 or in learning new detailed instructions. She can learn
 simple instructions and she has retained previously
 learned tasks. The claimant has average intelligence and
 fair insight and judgment.

12 (Tr. 18.) Considering this RFC and VE testimony, the ALJ found
 13 Plaintiff was able to perform her past relevant work as a home
 14 attendant. (Tr. 24, 336-37.) Because Plaintiff did not meet her
 15 burden at step four, the ALJ was not required to proceed to step
 16 five, where the burden of proof shifts to the Commissioner to show
 17 she could perform other work existing in significant numbers in the
 18 national economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).
 19 The ALJ concluded Plaintiff was not under a "disability" as defined
 20 by the Social Security Act at any time through the date of his
 21 decision. (Tr. 24.)

22 STANDARD OF REVIEW

23 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 24 court set out the standard of review:

25 A district court's order upholding the Commissioner's
 26 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 27 Commissioner may be reversed only if it is not supported
 28 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).

1 Substantial evidence is defined as being more than a mere
 2 scintilla, but less than a preponderance. *Id.* at 1098.
 3 Put another way, substantial evidence is such relevant
 4 evidence as a reasonable mind might accept as adequate to
 5 support a conclusion. *Richardson v. Perales*, 402 U.S.
 389, 401 (1971). If the evidence is susceptible to more
 6 than one rational interpretation, the court may not
 7 substitute its judgment for that of the Commissioner.
 8 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

9
 10 The ALJ is responsible for determining credibility,
 11 resolving conflicts in medical testimony, and resolving
 12 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 13 Cir. 1995). The ALJ's determinations of law are reviewed
 14 *de novo*, although deference is owed to a reasonable
 15 construction of the applicable statutes. *McNatt v. Apfel*,
 16 201 F.3d 1084, 1087 (9th Cir. 2000).

11 **SEQUENTIAL PROCESS**

12 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 13 requirements necessary to establish disability:

14 Under the Social Security Act, individuals who are
 15 "under a disability" are eligible to receive benefits. 42
 16 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 17 medically determinable physical or mental impairment"
 18 which prevents one from engaging "in any substantial
 19 gainful activity" and is expected to result in death or
 20 last "for a continuous period of not less than 12 months."
 21 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 22 from "anatomical, physiological, or psychological
 23 abnormalities which are demonstrable by medically
 24 acceptable clinical and laboratory diagnostic techniques."
 25 42 U.S.C. § 423(d)(3). The Act also provides that a
 26 claimant will be eligible for benefits only if his
 27 impairments "are of such severity that he is not only
 28 unable to do his previous work but cannot, considering his
 age, education and work experience, engage in any other
 kind of substantial gainful work which exists in the
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

1 In evaluating whether a claimant suffers from a
 2 disability, an ALJ must apply a five-step sequential
 3 inquiry addressing both components of the definition,
 4 until a question is answered affirmatively or negatively
 5 in such a way that an ultimate determination can be made.
 6 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The
 7 claimant bears the burden of proving that [s]he is

disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

4 It is the role of the trier of fact, not this court, to resolve
5 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
6 supports more than one rational interpretation, the court may not
7 substitute its judgment for that of the Commissioner. *Tackett*, 180
8 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
9 Nevertheless, a decision supported by substantial evidence will
10 still be set aside if the proper legal standards were not applied in
11 weighing the evidence and making the decision. *Brawner v. Secretary*
12 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
13 there is substantial evidence to support the administrative
14 findings, or if there is conflicting evidence that will support a
15 finding of either disability or non-disability, the finding of the
16 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
17 1230 (9th Cir. 1987).

ISSUES

19 The question is whether the ALJ's decision is supported by
20 substantial evidence and free of legal error. Plaintiff argues the
21 ALJ erred when he: (1) improperly evaluated the opinions of
22 examining and non-examining medical sources; and (2) failed to
23 consider obesity when assessing her ability to do basic work
24 activities. (Ct. Rec. 11 at 9-10.)

DISCUSSION

A. Evaluation of Medical Sources Opinions

The Commissioner's regulations distinguish among the opinions

of three types of acceptable medical sources considered in disability proceedings: (1) sources who have treated the claimant; (2) sources who have examined the claimant; and (3) sources who have neither examined nor treated the claimant, but express their opinion based upon a review of the claimant's medical records. 20 C.F.R. §§ 404.1527, 416.927. A treating physician's opinion carries more weight than an examining physician's, and an examining physician's opinion generally carries more weight than a non-examining reviewing or consulting physician's opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995), "As is the case with the opinion of a treating physician, the Commissioner must provide 'clear and convincing' reasons for rejecting the uncontradicted opinion of an examining physician." *Lester*, 81 F.3d at 830 (*citation omitted*). If the opinion is contradicted, it can only be rejected for "specific" and "legitimate" reasons that are supported by substantial evidence in the record. *Andrews*, 53 F.3d at 1043. Although the opinions of non-examining physicians generally are not given as much weight as examining physicians, their opinions are considered substantial evidence that may be given significant weight if supported by and consistent with other evidence in the record. *Lester*, 81 F.3d at 830-31.

Plaintiff contends the ALJ did not properly credit the findings of Richard Gallaher, Ph.D., the examining psychologist who interviewed Plaintiff on August 28, 2006, or the limitations assessed by non-examining agency psychologist, James Bailey, Ph.D. (Ct. Rec. 11 at 5-7.) In his argument, Plaintiff references

1 extensive case law relating to the special weight accorded treating
 2 medical sources in disability proceedings. (Ct. Rec. 11 at 6-9.)
 3 However, neither Dr. Gallaher nor Dr. Bailey is a treating source in
 4 this case.

5 **1. Dr. Gallaher**

6 At the request of the Social Security Administraton, Dr.
 7 Gallaher conducted a three-hour mental status interview with
 8 Plaintiff after reviewing a self-report of Statement of Health,
 9 Education and Employment, a disability report, and an intake
 10 assessment and notes from Idaho Department of Health and Welfare.
 11 (Tr. 238, 247-53.) From the interview and review of records,¹ Dr.
 12 Gallaher diagnosed posttraumatic stress disorder; major depressive
 13 disorder, recurrent, severe without psychotic features; panic
 14 disorder with agoraphobia; rule out bipolar disorder (most recent
 15 episode depressed, severe); and personality disorder NOS. (Tr.
 16 244.) He assessed a current Global Assessment of Functioning (GAF)
 17 score of 45, and highest GAF in the last year of 45. (*Id.*)
 18 Plaintiff argues the GAF score assessed by Dr. Gallaher, combined
 19 with other scores noted in the record, require a finding of
 20 disability. (Ct. Rec. 11 at 6.)

21 The GAF scale is a common tool for tracking and evaluating the
 22 overall psychological functioning of a patient. DIAGNOSTIC AND
 23 STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION (DSM-IV) at 32-34

24

25 ¹ Although Plaintiff references tests concluded by Dr. Gallaher
 26 (Ct. Rec. 11 at 5), it does not appear Dr. Gallaher administered or
 27 reviewed objective psychological testing as part of his evaluation.
 28 (Tr. 238.)

1 (1995). A score of 41-50 indicates "severe symptoms (e.g., suicidal
2 ideation, severe obsessional rituals, frequent shoplifting) OR any
3 serious impairment in social, occupation or school function (e.g.,
4 no friends, unable to keep a job)"; 51-60 indicates "moderate
5 symptoms (e.g., flat affect and circumstantial speech, occasional
6 panic attacks) OR moderate difficulty in social, occupational, or
7 school functioning (e.g., few friends, conflict with peers or co-
8 workers)." A score of 61-70 indicates "some mild symptoms, (e.g.,
9 depressed mood and mild insomnia) OR some difficulty in social,
10 occupational, or school functioning (e.g., occasional truancy, or
11 theft within the household), but generally functioning pretty well,
12 has some meaningful interpersonal relationships." (*Id.*)

13 As explained by the DSM-IV, the GAF scale is intended to assist
14 practitioner's in treatment decisions. *Id.* at 36. It is not
15 intended to be a measure of disability. In fact, the Commissioner
16 has explicitly disavowed any use of the GAF scores as an indicator
17 of disability. In August 2000, the Commissioner, in discussing
18 comments to the current mental disorder evaluation regulations,
19 stated that "[t]he GAF scale . . . does not have a direct
20 correlation to the severity requirements in our mental disorder
21 listings." 65 Fed. Reg. 50746-01, 50765 (August 21, 2000) (found
22 at 2002 WL 1173632). Plaintiff has provided no authority to support
23 his argument that disability may be determined on the basis GAF
24 scores alone. See *Howard v. Commissioner of Soc. Security*, 276 F.3d
25 235, 241 (6th Cir. 2002).

26 Nonetheless, the ALJ thoroughly discussed the GAF score
27 assessed by Dr. Gallaher and gave specific, legitimate reasons for
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1 giving his assessment little weight. (Tr. 23.) Specifically, he
2 referenced higher GAF ratings and reports of improvement in
3 functioning from Plaintiff's treating counselors in 2007 and 2008.
4 (See Tr. 247, 249, 257, 280, 284, 296, 300.) As found by the ALJ,
5 these counselors "had established an ongoing counseling relationship
6 with the claimant, [and] it is likely the counselor would have a
7 better overall picture of the claimant's functional abilities than
8 would a consultative examiner who only saw the claimant one time."
9 (Tr. 23.) He also referenced a November 2007 medication management
10 report from Jean Hammond, M.D., who interviewed Plaintiff for a
11 medication management consult. Based on her interview and a review
12 of prior records and counselor notes, Dr. Hammond estimated a GAF
13 score of 60-70. (Tr. 23, 275-76.) Thus, the ALJ gave specific and
14 legitimate reasons for assigning little weight to Dr. Gallaher's
15 single GAF score of 45. *Social Security Ruling (SSR) 06-3p.* The
16 ALJ's evaluation of Dr. Gallaher's opinions is supported by
17 substantial evidence in the entire record and is free of legal
18 error.

19 **2. Dr. Bailey**

20 Plaintiff argues the "moderate" limitations included in the
21 check box portion (Section I) of the mental RFC form completed by
22 Dr. Bailey require a finding of disability. (Ct. Rec. 11 at 6.) In
23 support of this contention, Plaintiff references VE testimony that
24 an individual with these limitations could not maintain work over
25 time. (*Id.*; Tr. 202-04, 337-38.) Plaintiff contends the ALJ failed
26 to address this testimony, and appears to argue Dr. Bailey was a
27 treating source whose limitation findings warranted more weight.
28

1 (See Ct. Rec. 11 at 6-8.) Plaintiff's argument is unpersuasive.

2 Dr. Bailey is a non-examining agency psychologist,² who
 3 reviewed Plaintiff's records in September 2006. (Tr. 195-204.)
 4 After reviewing the records available, Dr. Bailey noted several
 5 moderate limitations in Plaintiff's mental functioning. (Tr. 202-
 6 03.) In the narrative portion of his report, however, Dr. Bailey
 7 concluded Plaintiff was "capable of uncomplicated work," "would do
 8 best with only superficial interaction with the public," and was
 9 "capable of planning, travel, and avoiding hazards." (Tr. 204.)

10 Where, as here, there is a perceived conflict or ambiguity in
 11 medical evidence, it is the ALJ's responsibility to resolve the
 12 conflict. *Thomas v. Barnhart*, 278 F.3d 947, 956-57 (9th Cir. 2002).
 13 The ALJ properly addressed Dr. Bailey's report and the VE testimony
 14 based on the checkmark portion of Dr. Bailey's report, found in
 15 Section I of the mental RFC form. (Tr. 22-23.) He assigned "little
 16 weight to that analysis." (Tr. 22.) Citing agency guidelines, the
 17 ALJ gave a lengthy explanation for his rejection of these
 18 limitations, stating that the checkmark "worksheet" in Section I
 19

20 ² As reviewing medical sources in disability proceedings,
 21 "state agency medical and psychological consultants are highly
 22 qualified physicians and psychologists who are experts in the
 23 evaluation of medical issues in disability claims under the Social
 24 Security Act." SSR 96-6p. Their findings of fact must be treated
 25 as expert opinion evidence of non-examining sources by the ALJ, who
 26 can give weight to these opinions only insofar as they are supported
 27 by evidence in the case record. The ALJ cannot ignore these
 28 opinions and must explain the weight given. *Id.*

1 "does not constitute the RFC assessment." (Tr. 23.) However, the
2 ALJ gave "significant weight" to Dr. Bailey's narrative opinions,
3 which agency guidelines indicate are "the actual mental RFC
4 assessment." *Id.* Dr. Bailey's credited opinions based on evidence
5 in 2006 are consistent the ALJ's final RFC determination and the
6 opinions of mental health providers who treated Plaintiff in 2007
7 and 2008, as discussed above, and are, therefore, supported by
8 substantial evidence. (Tr. 18.) The ALJ's explanation is based on
9 substantial evidence and his findings represent a rational
10 interpretation of the record in its entirety; he did not err in the
11 weight given to Dr. Bailey's opinions.

12 **B. Obesity**

13 Plaintiff contends the ALJ's failure to consider the effects of
14 obesity when determining her ability to work is cause for reversal.
15 (Ct. Rec. 11 at 9.) While obesity has been eliminated as a Listing,
16 it is considered a medically determine impairment and can constitute
17 the equivalence of a Listing. *SSR 02-01p. Social Security Ruling*
18 02-01p addresses the significance of obesity in the sequential
19 evaluation process. The ruling recognizes that obesity will
20 constitute a severe impairment when "it significantly limits an
21 individual's physical or mental ability to do basic work activities.
22 . . ." *SSR 02-01p.* However, the fact that obesity exists does not
23 automatically mean the symptoms are "severe," or "disabling" as
24 defined by the Social Security regulations. See, e.g., *Edlund*, 253
25 F.3d at 1159-60. Nonetheless, the Commissioner advises where there
26 is evidence of obesity, the limiting effects (if any) should be
27 considered in combination with other medical condition, such as
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1 musculoskeletal impairments and depression. SSR 02-01p.

2 Plaintiff testified she is 64 inches in height and her weight
3 fluctuated between 210 and 240 pounds. (Tr. 335.) Medical records
4 indicate her height was 65 inches and weight was between 247 and 252
5 pounds. (Tr. 188-90.) She stated she thought her weight gain was
6 due to lack of exercise and ambition. (*Id.*) Although Plaintiff's
7 weight was mentioned in medical reports, and Dr. Hammond noted
8 "obesity" in her Axis III impressions (Tr. 276), Plaintiff has not
9 presented a theory or evidence that she met or equaled the prior
10 listing for obesity. 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 9.09
11 (Table II) (April 1, 1999) (64 inches/258 pounds; 65 inches/266
12 pounds). Further, she does not reference evidentiary support for
13 her argument that her weight had an impact on her functioning or
14 present a theory as to how her weight impacts her capacity for work
15 related tasks. Independent review of the record reveals no medical
16 opinions that Plaintiff's condition was aggravated by obesity.

17 Nonetheless, the ALJ specifically discussed medical conditions
18 that could be impacted by obesity. As found by the ALJ, Plaintiff
19 did not mention back pain at the hearing and medical records did not
20 reflect treatment for back problems. (Tr. 17.) In his assessment
21 of Plaintiff's ability to work, the ALJ discussed treatment notes
22 from mental health counselors who reported periods in which
23 Plaintiff denied having symptoms of depression, her development of
24 good coping skills, her improvement of depression symptoms (which
25 were considered relatively mild), and cyclical problems with anger
26 which her counselor noted were of short duration. (Tr. 20; see,
27 e.g., Tr. 277-82, 285, 290, 300.) Plaintiff neither alleged mental
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1 symptoms that were aggravated by her weight nor met her burden of
2 providing evidence that her excessive weight contributed to her
3 functional impairments.

The ALJ's hypothetical included all physical and mental limitations supported by the record and Plaintiff's credible testimony; therefore, the VE's opinion that Plaintiff could perform her past work is supported by substantial evidence. The ALJ's exclusion of limitations due to obesity in his RFC determination is a rational interpretation of the evidence presented and does not constitute legal error.³ His RFC findings are supported by

³ It is noted on independent review that when ALJ Gaughen presented his hypothetical individual to the VE during the hearing, he was mindful of references to obesity in the medical record when he stated: "[T]he lady presents with no exertional impairments. There is a vocationally relevant issue under the rules, however, of some obesity." (Tr. 336.) The VE, who had read the vocational report in the record and was present throughout Plaintiff's description of her past work, confirmed the home attendant work as performed by Plaintiff would be light exertion. (Tr. 336.) He then opined the hypothetical individual presented would be able to perform Plaintiff's past relevant work as a home attendant. (Tr. 320, 324-28, 337.) Thus, even assuming the ALJ erred at step two when he did not include obesity as a non-severe impairment or discuss it in his final RFC determination, the ALJ's hypothetical and the VE's consideration of obesity with the other limitations at step four renders the alleged error harmless. *Lewis v. Astrue*, 498 F.3d 909, 910 (9th Cir. 2007); *Stout v. Commissioner, Social Sec.*

1 substantial evidence and may not be disturbed. *Key*, 754 F.2d at
2 1549.

3 **CONCLUSION**

4 The ALJ's determination is a rational interpretation of the
5 record in its entirety and is supported by substantial evidence.
6 Accordingly,

7 **IT IS ORDERED:**

8 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 10**) is
9 **DENIED**;

10 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 12**) is
11 **GRANTED**.

12 The District Court Executive is directed to file this Order and
13 provide a copy to counsel for Plaintiff and Defendant. Judgment
14 shall be entered for Defendant and the file closed.

15 DATED January 25, 2010.

16
17 _____
18 S/ CYNTHIA IMBROGNO
19 UNITED STATES MAGISTRATE JUDGE
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25 Admin., 454 F.3d 1050, 1056 (9th Cir. 2006)(non-prejudicial error in
26 proceedings is harmless); *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9
27 (9th Cir. 1995)(error is harmless when the correction of that error
28 would not alter the result).